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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5889

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

v.

BERNHARDT S. KRAMER, Commissioner,
Ulster County Department of Social
Services, et al.

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

The petitioners ask leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Leave to proceed in forma pauperis was sought and granted in the Supreme Court of the State of New York, Appellate Division, Third Department.

The petitioners' affidavit in support of this motion is attached.

MARTIN GUGGENHEIM
Washington Square Legal Services, Inc.
Attorney for Petitioner
80 Fifth Avenue
Suite 1501
New York, New York 10011
(212) 924-3200

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- against -

BERNARDT S. KRAMER, Commissioner, Ulster County Department of Social Services, et al.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

MARTIN GUGGENHEIM
Washington Square Legal Services, Inc.
80 Fifth Avenue
Suite 1501
New York, New York 10011
(212) 924-3200
Attorney for Petitioner

ALAN N. SUSSMAN
185 Fair Street
Kingston, New York 12401
Of Counsel

QUESTION PRESENTED

Whether Section 622 of the Family Court Act of the State of New York is unconstitutional because it permits the Family Court to terminate parental rights on a finding of permanent neglect which is based upon a "fair preponderance of the evidence."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80

JOHN SANTOSKY II and ANNIE SANTOSKY,

Petitioners,

- against -

BERNARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

Petitioners, John Santosky II and Annie Santosky, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of New York, Appellate Division, Third Department, entered on May 1, 1980, which unanimously affirmed an order of the Ulster County Family Court entered on April 5, 1979.

OPINIONS BELOW

The Family Court of the State of New York, Ulster County (Elwyn, J.), adjudged petitioners' three children permanently neglected and ordered that petitioners' parental rights be terminated. In the Matter of Tina Frances Apel, et al. (Opinion entered March 12, 1979 and attached as Appendix "B"; orders entered April 5, 1979, and attached as Appendix "C").

The Appellate Division, Third Department, affirmed the Ulster County Family Court. In the Matter of John AA, et al., ___ A.D.3rd ___, 427 N.Y.S.2d 319 (May 1, 1980). (Appendix "A").

Petitioners' appeal to the Court of Appeals was dismissed on September 16, 1980. In the Matter of Tina A., ___ N.Y.2d ___. (Appendix "D").

JURISDICTION

The New York Supreme Court, Appellate Division, Third Department, affirmed the Ulster County Family Court on May 1, 1980. Petitioners' appeal to the Court of Appeals was dismissed on September 16, 1980. This petition is timely filed within ninety (90) days of the date of the Court of Appeals' dismissal. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall...deprive any person of life, liberty, or property, without due process of law....

Section 622 of the New York Family Court Act provides:

> Definition of "fact-finding hearing" - When used in this part, "fact-finding hearing" means in the case of a petition permanently to terminate custody a hearing to determine whether the allegations required by paragraphs (a), (b), (c), and (d) of section six hundred fourteen are supported by a fair preponderance of the evidence.

STATEMENT OF THE CASE

On October 16, 1979, respondent Bernhardt S. Kramer, Commissioner of the Ulster County Department of Social Services, filed a petition in Ulster County Family Court alleging minors John Santosky III, Jed Conrad Santosky and Tina Frances Apel to be permanently neglected by petitioners, John Santosky II and Annie Santosky

Prior to trial, petitioners notified the Attorney General of New York, pursuant to Section 71 of the Executive Law, that they intended to assert at the hearing that the Family Court Act was unconstitutional in that it required a standard of proof for finding permanent neglect based on a "fair preponderance of the evidence" rather than upon "clear and convincing" evidence in violation of the Due Process Clauses of the United States Constitution, Amendment 14, and the New York Constitution, Article 1, Section 6. On January 2, 1979, the Attorney General responded that he would not appear in the hearing.

A fact-finding hearing was held in the Family Court, Ulster County on January 23, 26, 31 and February 1, 1979. On the first day of the hearing, in his opening statement, counsel for petitioners reasserted the claim that the statu-

tory standard for finding permanent neglect, located in Section 622 of the Family Court Act, was unconstitutional. He stated, "I have challenged this...on the grounds that it denies the respondents the due process of law and that the appropriate standard of proof should be...clear and convincing evidence." The Court thereupon took note that the Attorney General had been notified and had elected not to appear.

After the conclusion of the hearing, the Family Court of Ulster County determined that the petition should be granted and concluded that "the record in this case supports by a preponderance of the evidence a finding that there has indeed been a failure on the part of these parents to 'plan for the future of (their children) although physically and financially able to do so.'"

In the court's fact-finding decision, dated March 22, 1979, it devoted two full pages to a discussion of petitioners' claim that the standard of proof required by Section 622 of the Family Court Act was unconstitutional. After noting that the Attorney General had been notified and elected not to appear, the court stated that "a finding of unconstitutionality should not be lightly undertaken by courts of first instance." The court explicitly decided to terminate petitioners' parental rights "upon the standard of proof prescribed by the statute -- 'a fair preponderance of the evidence.'"

Petitioners then appealed directly to the Court of Appeals, claiming that the sole issue involved was a constitutional question. The Court of Appeals declined jurisdiction by ruling that issues other than the constitutional question were involved. The court transferred the matter to the Appellate Division, Third Department.

In their brief to the Appellate Division petitioners argued only one point: that Section 622 of the Family Court Act is unconstitutional in that it denied to petitioners a fundamental right without due process of law. Petitioners again argued that the United States and New York constitutional guarantees of due process of law require that the termination of parental rights be supported by no less than clear and convincing evidence. In a Memorandum Decision, the Third Department followed a previous case decided by that court which held that Section 622 was constitutional. In adhering to the earlier decision, the court noted that "the permanent neglect statute...recognizes and seeks to balance rights possessed by the child...with those of the natural parents... Accordingly, application of the preponderance of evidence standard in such a proceeding involving these often conflicting rights is proper and constitutional." In the Matter of John "AA", ___ A.D. ___, ___, 427 N.Y.S.2d 319, 320 (3rd Dept. 1980)(citations omitted).

Petitioners appealed to the Court of Appeals of New York, which dismissed the appeal on September 16, 1980.

REASONS FOR GRANTING THE WRIT

I

The precise issue presented in this petition is presently before this Court. Doe v. Delaware, Docket No. 79-5932. If the Court decides in Doe that termination of parental rights must be based on more than a preponderance of the evidence, that decision may not be applied retroactively. Thus, refusal to grant this petition may result in the irrevocable termination of petitioners' parental rights even though the

termination was based on a constitutionally deficient standard. Because the rights at stake are so fundamental, petitioners urge the Court to grant the petition and schedule the case for plenary argument or, minimally, hold the petition until a final decision is rendered in Doe v. Delaware.

II

The substantial importance of the constitutional question involved in this case is most apparent from the fact that the same question is presently before the Court.

Furthermore, it has been the consistent opinion of this Court that the interest of parents in the custody and control of their children is one of the highest rights recognized in American jurisprudence. See Parham v. J.L., 442 U.S. 584 (1979); May v. Anderson, 345 U.S. 528, 533 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

Petitioners contend that New York State has deprived them of their fundamental right to the custody of their children without due process of law. It is now beyond peradventure that "freedom of personal choice in matters of... family life is one of the liberties protected by the due process clause of the Fourteenth Amendment." Cleveland Board of Education v. La Fleur, 414 U.S. 632, 639 (1974), cited again in Quilloin v. Walcott, 434 U.S. 246, 255 (1978). See also, Stanley v. Illinois, 405 U.S. 645 (1972); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Griswold v. Connecticut, 301 U.S. 479 (1965).

Standard of proof is an integral function of due pro-

cess. Addington v. Texas, 441 U.S. 418 (1979). Deprivation of sacred family rights based on a standard of proof as low as "preponderance of the evidence" is a flagrant violation of the Fourteenth Amendment. Petitioners' claim must be preserved in order to provide them a hearing that comports with due process.

III

The Third Department's decision upholding the New York statute is in conflict with at least two federal courts and at least twenty-two state appellate courts. Those courts have ruled that the standard of proof for the termination of parental rights and/or adjudication of neglect or abuse must be raised from a "preponderance of the evidence" to a higher standard. The decisions so holding are as follows:

State Courts:

Alabama - Dale County Dept. of Pensions v. Robles, 368 So.2d 39 (Ala. Civ. App. 1979).

Alaska - In re K.S., 2 Fam. L. Rptr. 2198 (1976).

Arisona - Caruso v. Superior Court, 100 Ariz. 174, 412 P.2d 463 (1966).

California - In re Cynthia K., 75 Cal. App.3d 81, 141 Cal. Rptr. 875 (1977); In re Christopher B., 82 Cal. App.3d 609, 147 Cal. Rptr. 390 (1978); In re Angelina M.P., 6 Fam. L. Rptr. 2490 (Calif. Ct. App., 3rd Dist. 1980).

District of Columbia - Matter of Adoption of J.S.R., 374 A.2d 860 (D.C. App. 1977).

Florida - In Interest of C.K.G., 365 So.2d 424 (Fla. App. 1978).

Illinois - Interest of Jones, 34 Ill. App.3d 603, 340 N.E.2d 296 (1975); In re Ybarra, 29 Ill. App.3d 725, 331

N.E.2d 224 (1975); In re Tolbert, 62 Ill. App.3d 927, 38 N.E. 2d 565 (1978).

Iowa - In re Hochmuth, 251 N.W.2d 484 (1977); Long v. Long, 255 N.W.2d 140 (1977); In re Kelly, 262 N.W.2d 781 (1978).

Kansas - In re Eric Hambleton, 574 P.2d 982 (1978); In Interest of Kerns, 225 Kan. 746, 594 P.2d 187 (1979).

Louisiana - State in Interest of Gray, 353 So.2d 393 (1977); In Interest of Jackson, 312 So.2d 912 (La. App. 1975).

Minnesota - In re Welfare of Rosenbloom, 266 N.W.2d 888 (1978).

Nebraska - In Interest of Souza, 204 Neb. 503, 283 N.W. 2d 48 (1979.

New Hampshire - State v. Robert H., 393 A.2d 1387 (1978).

New Jersey - Matter of Guardianship of R., 155 N. J. Super. 186, 392 A.2d 634 (1977); In re B.C.H., 108 N.J. Super. 531, 262 A.2d 4 (1970).

New Mexico - Huey v. Lente, 85 N.M. 597, 514 P.2d 1093 (1973).

Pennsylvania - In re William L., 383 A.2d 1228 (1978).

Texas - In re G.M., 596 S.W.2d 846 (Tex. 1980).

Utah - In Interest of Pitts, 535 P.2d 1244 (Utah 1978).

Virgin Islands - In re Maria, Elisa and Norma C., 5 Fam. Law Rptr. 2039 (Terr. Ct. 1978).

Washington - In re Sego, 82 Wash. 2d 736, 513 P.2d 831 (1973).

West Virginia - In re Willis, 207 S.E.2d 129 (W. Va. 1978).

Wyoming - In re X, Y, and Z, 607 P.2d 911 (Wyo. 1980).

Federal Courts:

Eighth Circuit Court of Appeals - Alsager v. District Court of Polk County, Iowa, 545 F.2d 1137 (1976), affirming

406 F. Supp. 10 (S.D. Iowa 1975).

Southern District of Texas - Sims v. Moore, 438 F. Supp. 1179 (1977)(reversed on jurisdictional grounds, 442 U.S. 415, 1979).

In addition, the lower court's decision upholding the "preponderance of the evidence" standard is possibly in conflict with two decisions of this Court.

In re Winship, 397 U.S. 358 (1970) established that when a child faces loss of liberty for a law violation, due process requires that the facts against him be proved beyond a reasonable doubt. Regardless of whether the proceedings are labeled civil or criminal, and even though delinquency proceedings are concerned with a "child's best interest," the nature of the right at stake, to wit, liberty, calls for the highest standard of proof. 397 U.S. at 367. Justice Harlan, concurring, explained that "the choice of the standard for a particular adjudication does...reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations." 397 U.S. at 370. In termination of parental rights proceedings, an erroneous factual determination costs families their fundamental right to family integrity. Surely such a right deserves more protection than what the "preponderance of the evidence" standard provides.

Addington v. Texas, 441 U.S. 418 (1979) raised the standard of proof required in civil commitment procedures from a "preponderance" of the evidence to "clear and convincing" evidence. That case discussed the intermediate standard of proof - i.e., "clear and convincing" evidence - as applicable to cases in which the interest at stake is more substantial than mere loss of money. When important rights are

at stake, the risk of losing them must be reduced by raising the standard of proof.

The Appellate Division's decision approving the "preponderance of the evidence" standard does not comport with the principles regarding allocation of risks as announced in Winship, supra, and Addington, supra. In order to protect the fundamental right to family integrity, a deprivation of that right must be based on no less than clear and convincing evidence.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,*

MARTIN GUGGENHEIM
Washington Square Legal Services, Inc.
80 Fifth Avenue
Suite 1501
New York, New York 10011
(212) 924-3200

Attorney for Petitioner

ALAN N. SUSSMAN
185 Fair Street
Kingston, New York 12401
Of Counsel

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* Counsel wish to acknowledge the invaluable work of Lynn Armentrout, a third-year law student at New York University School of Law, in the preparation of this petition.

APPENDICES

Supreme Court—Appellate Division
Third Judicial Department

MAY 5 1980

May 1, 1980 36228

In the Matter of JOHN "AA"* et al., Children Alleged to be Permanently Neglected.

BERNHARDT S. KRAMER, as Commissioner, Ulster County Department of Social Services,
Respondent,

v.

JOHN "AA"* et al., Appellants.

Appeal from a judgment of the Family Court of Ulster County (Elwyn, J.), entered April 5, 1979, which adjudged appellants' three children to be permanently neglected pursuant to article 6 of the Family Court Act.

The sole contention upon this appeal is that section 622 of the Family Court Act is unconstitutional because the standard of proof required by the statute, a fair preponderance of the evidence, is so low that it deprives them of due process of law. In Matter of Anthony L. "CC" (48 A D 2d 415, 419), this court held that the level of proof required by section 622 was constitutional. In adhering to our decision, we note that the permanent neglect statute (Social Services Law, § 384-b; Family Ct. Act, § 611, et seq.) recognizes and seeks to balance rights possessed by the child (see Social Services Law, § 384-b, subd. 1; Matter of Bennett v. Jeffreys, 40 N Y 2d 543, 546, 547) with those of the natural parents (see Social Services Law, § 384-b, subd. 1; Matter of Sanjivini K., 47 N Y 2d 374, 382; Matter of Corey L v. Martin L, 45 N Y 2d 383, 392). Accordingly, application of the preponderance of evidence standard in such a proceeding involving these often conflicting rights is proper and constitutional.

Judgment affirmed, without costs.

MAHONEY, P. J., GREENBLOTT, KANE, MAIN and MIKOLL, JJ., concur.

* Fictitious name.

STATE OF NEW YORK

FAMILY COURT : ULSTER COUNTY

In the Matter of the Commitment of Guardianship and Custody pursuant to § 384-b of the Social Services Law of TINA FRANCES APEL, JOHN SANTOSKY III, and JED CONRAD SANTOSKY, children under the age of Eighteen years alleged to be Permanently Neglected Children.

April 5, 1979

RICHARD W. GRIGGS, Attorney for Commissioner of Social Services.

ALAN SUSSMAN (VICTORIA BLYTHE of Counsel), Attorney for Respondent.

MARRIN & SMYTH (ROSEMARY SMYTH, of Counsel), Attorneys for Foster Parents.

JAY SAMOFF, Law Guardian.

HUGH R. ELWYN, J: The Court has previously found that the allegations required by paragraphs (a), (b), (c) and (d) of section six hundred fourteen of the Family Court Act were supported by a fair preponderance of the evidence (F.C.A. 622).

After a dispositional hearing held on April 5, 1979 the Court now finds that the best interests of all three of the Santosky children require that their parents' custody be terminated permanently (F.C.A. § 623) and that their guardianship and custody be committed to the petitioner, the Commissioner of Social Services of Ulster County (F.C.A. § 631, subd (c). The petitioner's witnesses, Daniel Lucy and Lynn Davis, the social workers in charge of the Santosky case, and the petitioner's two expert witnesses, Dr. Lenore M. Sportsman, Director of the Albany Child Guidance Center and Elizabeth Smith, Director of the Family Service Center of the Children's Home of Kingston were unanimous and firm in their opinion that the children's best interests required that the parents' right to their custody be permanently terminated and that a permanent and stable home environment be sought for each child through the medium of adoption. No evidence to the contrary has been presented on behalf of the respondents.

The court notes, however, that Dr. Lenore Sportsman expressed the opinion that the children John and Tina could be expected to continue to have psychological difficulties in adjusting to any home situation and that she therefore strongly recommended and, in fact, considered it essential that any set of adoptive parents

should be receptive, amenable and cooperative with efforts to provide them with such professional counseling, whether in the form of psychiatric, psychological, or family counseling services as might be offered to them.

Accordingly, the Court directs the entry of order pursuant to section 687 of the Family Court Act committing the guardianship and custody of Tina Frances Apel, John Santosky III and Jed Conrad Santosky to the Commissioner of Social Services of Ulster County, but will attach to the order of commitment the condition that Commissioner provide supportive help to each child and their respective foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisers may be required to best promote the adjustment of child and foster parents, or adoptive parents, to a healthy and permanent relationship.

The Clerk will prepare and submit an appropriate order.

Dated: April 10, 1979.

STATE OF NEW YORK

FAMILY COURT : ULSTER COUNTY

In the Matter of the Commitment of Guardianship and Custody pursuant to § 384-b of the Social Services Law of TINA FRANCES APEL, JOHN SANTOSKY III, and JED CONRAD SANTOSKY, children under the age of Eighteen Years alleged to be Permanently Neglected Children.

Docket Nos. B-3-4-5-78.

January 26, 31, February 1, 1979

RICHARD W. GRIGGS, Attorney for Commissioner of Social Services.

ALAN SUSSMAN, Attorney for Respondents.

MARRIN & SMYTH, (WILFRID E. MARRIN, of Counsel), Attorneys for Foster Parents.

JAY SAMOFF, Law Guardian.

HUGH R. ELWYN, J: This case represents a second attempt [1] by the Commissioner of Social Services of Ulster County to terminate permanently the parental rights of John and Annie Santosky by reason of the permanent neglect of their three children.

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1. For the result of the first attempt see Matter of Santosky, 89 Misc. 2d 730, affd., 63 AD2d 750.

(Family Court Act, Art. 6). Each of these three children have been previously adjudicated to be neglected children within the meaning of Article 10 of the Family Court Act and placed with the Commissioner of Social Services for an initial period of 18 months, subject to the further order of the court. Tina Frances Apel, now age 7, has been in foster home placement since November 20, 1973; John Santosky, now age 5, since September 30, 1974 and Jed Conrad Santosky, now age 4, since September 30, 1974. The placement of these three children has twice been extended (Family Court Act § 1055), the latest extension being on June 14, 1977, and a third application for an extension of placement filed June 13, 1978 is currently pending with this proceeding. The Court takes judicial notice of its own records that relate to the proceeding before it (Matter of Denlow, 87 Misc. 2nd 410, 411-412 and cases there cited).

This proceeding instituted pursuant to Section 384-b of the Social Services Law (L. 1976, c 666, effective January 1, 1977) [2] was initiated by the filing of a petition on October 16, 1978 pursuant to subd. 4 (d) of that law and Article 6 of the Family

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2. This statute had been enacted, but was not effective at the time of the earlier trial in this case which occurred in November 1976.

Court Act. The Petition contains all of the necessary allegations required by Section 614 of the Family Court Act.

Although the petition alleges, after detailing the agency's diligent efforts to encourage and strengthen the parental relationship, that "notwithstanding such efforts, the parents have failed for a period of more than one year following the date the children came into the care of the petitioner, an authorized agency, substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so" (F.C.A. § 614, subd. 1 (d), it was not contended nor was any proof offered at the trial that the parents had failed to maintain contact with their children. On the contrary it is conceded they have through their counsel, diligently sought to have permitted to them such contact through supervised visits as the agency would allow. At one point in these proceedings the Agency, upon advice of their expert consultant in child psychiatry, sought to curtail altogether the parents' contact with their children in foster care upon the ground that such visitation was confusing and even detrimental to the children's emotional well being. The parents' right to maintain contact with their children through periodic visitation was restored only through the

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intervention of the court. [3]

However, the proof in this case shows that on some sixteen occasions when visits with their children were scheduled the father was from twenty minutes to an hour late and on one occasion when fire engines passed the house found them momentarily more demanding of his time and attention. In any event, such visits as did take place between the parents and their children were at best superficial and devoid of any real emotional content, and were probably wholly meaningless from the standpoint of the children who have come to view their real parents as strangers and their meeting with them as something only to be endured. From the caseworker's description of the infrequent visits that have occurred the court finds such visits to have been "of such character as to overtly demonstrate a lack of affection and concerned parenthood" (Social Services Law, § 384-b, subd. 7 (b). Such visits "shall not be deemed a substantial contact". (Social Services Law, § 384-b subd. 7 (b). Moreover, it is noted that the same subdivision of section 384-b of the Social Services Law declares that: "(F)or the purposes of paragraph (a) of this

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3. See written, but unpublished, decision of this court, dated June 27, 1977, pp. 10-14. Appendix A.

subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child." Consequently, the court could, even though the point is not seriously urged by the Commissioner, find the children to be permanently neglected, on that ground alone (Matter of Orlando, 40 N.Y. 2d 103).

The Commissioner has elected, however, as in the first case, to predicate his contention that the children have been permanently neglected solely upon the parents' "failure to plan for the future of their children" (F.C.A. §§ 611, 614, subd. 1, (d)) "The statute * * * is stated in the disjunctive and, thus, even though parents may maintain contact with their children, the failure to plan for the future of the children, in and of itself, suffices to support a determination of permanent neglect (Matter of Orlando F., 40 N.Y. 2d 103; Matter of Amos HH, 59 AD2d 795)" (Matter of Leon "RR", 64 AD2d 118 , 3rd Dept., January 25, 1979). The Commissioner has, quite wisely I believe, eschewed any temptation to predicate this case upon the theory that there has evolved from Bennett v. Jeffreys, 40 N.Y. 2d 543 a non-statutory, no-fault basis for the permanent termination of parental rights.

Even though this case is predicated upon and is decided on statutory grounds (Social Services Law 384-b and F.C.A. Art. 6), the non-statutory - no-fault concept as a basis for the permanent termination of parental rights has had such an appealing fascination for some courts that it deserves some discussion here, lest this insidious and pernicious doctrine of questionable constitutional validity find further lodgment in the law.

The Non-Statutory, No-Fault Concept.

Although Matter of Bennett v. Jeffreys, 40 N.Y. 2d 543 did not "involve an attempted permanent termination of custody (Family Court § 614, subd 1; § 631; Matter of Anonymous (St. Christopher's Home), 40 N.Y. 2d 96; Matter of Orlando F., 40 N.Y. 2d 103; Matter of Ray A.M., 37 N.Y. 2d 619)" some courts have found in the "extraordinary circumstances" rule of Bennett, particularly where there has been a "protracted separation" of parent and child and "the psychological trauma of removal is grave enough to threaten destruction of the child," a new non-statutory, no-fault ground for termination of parental rights. Since the Court of Appeals in Bennett did not expressly create such a new ground for termination of parental rights and was indeed careful to state with care and specificity the circumstances under which inter-

vention by the State in the right and responsibility of a natural parent to custody of a child would be warranted (p. 549), the source of this novel predicate for the exercise of the power of the State can only be traced to the command of the same court in Matter of Sanjivini K., 40 N.Y. 2d 1025, 1026, to resolve "the status of the child and the rights and obligations of the parties in that permanent neglect proceeding in conformity with the standards we have enunciated (Matter of Bennett v. Jeffreys, 40 N.Y. 2d 543)."

Instead of limiting the command of the court to the dispositional phase of a proceeding for the permanent termination of parental rights (Family Court Act, Art. 6) where by statute "the best interests of the child" is the focus and thrust of the proceeding (Family Court Act §§ 623, 614, subd. 1 (6)), the courts have found in Bennett a new non-statutory, no-fault ground for terminating parental rights (See Matter of Sanjivini K., 63 AD 2d 1021). This newly invented concept of "de facto permanent neglect" did not, however, go completely unchallenged, but was in fact severely criticized by the two dissenting justices as a concept for which there was no statutory authority or decisional precedent - one not sanctioned by anything in Bennett v. Jeffreys

(See dissent pp. 1021-1031).[4]

A number of other appellate courts have by their holdings likewise seemingly sanctioned the creation of this new and independent non-statutory, no-fault ground for the termination of parental rights (See, Matter of Abbott House v. Barbara J., 55 AD2d 604; Matter of Leticia Rose M., 54 AD2d 909; Matter of Kim Marie J., 59 AD2d 716; Matter of Jean Yvette E., 59 AD2d 907; Matter of Jonathan D., Jewish Child Care Assn. v. Donald F.D., 62 AD2d 947).[5]

It remained, however, for the judges of the Family Court to come forth with a clear and unequivocal articulation of the new concept of a non-statutory, no-fault ground for the termination of parental rights. The first to do so was Judge DONOVAN of Westchester County in Matter of Amy S., 89 Misc. 2d 42, 49-50, followed by Judge GARTENSTEIN of New York County in Matter of

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4. Matter of Sanjivini K., 63 AD2d 1021 is on appeal to the Court of Appeals. The case should provide final clarification of the "best interests" test of Bennett v. Jeffreys to statutory termination proceedings.

5. The Appellate Division affirmed an order dismissing a permanent neglect petition, but modified it by directing the court to hold a dispositional hearing on the issue of the best interest of the child. Pursuant to that direction the Family Court held a hearing and continued foster care. However, the Family Court, recognizing the unsatisfactory state of the case law in this area urged the court of Appeals to rule on the applicability of Bennett, 40 N.Y. 2d 543 to cases involving Agencies and the termination of parental rights (Matter of Jonathan D., Fam. Ct., New York Co., N.Y.L.J. Feb. 9, 1979, p. 6, c. 3).

Suzanne Y., 92 Misc. 2d 652, 658-661,[6] Judge MILLER of Rockland County in Matter of Strausberg, 92 Misc. 2d 620, 624 and Judge FOLLETT of St. Lawrence County in Matter of Andress, 93 Misc. 399, 402-403.

Most recently, the Appellate Division (3rd Dept) in Matter of Leon "RR", 66 AD2d 118 , has found in Matter of Bennett v. Jeffreys, 40 N.Y. 543 and Matter of Sanjivini K., 40 N.Y. 2d 1025 "a common law standard for termination of parental rights independent of the statutes", citing Matter of Kim Marie J., 59 AD2d 716, and Matter of Suzanne Y., 92 Misc. 2d 652.

All of this, as Judge DONOVAN in Matter of Amy S., supra points out (p. 50), is to embark upon a "path fraught with danger", for the concept opens the lid of a "Pandora's Box" (p. 45). Likewise, Judge GARTENSTEIN in Matter of Suzanne Y., supra 662 was equally uncomfortable with the unpredictability and the potential for abuse and tyranny such a concept provides for social agencies and courts to exercise for the good of its victims.

Moreover, the concept of a non-statutory, no-fault ground for the termination of parental rights, because a court determines that "the best interests" of the child requires it, is fraught

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6. Matter of Suzanne Y., 92 Misc. 2d 652 has been reversed by the Appellate Division, First Department, 66 AD2d 723 . The Court unanimously rejected Judge Gartenstein's "no fault" theory of termination of parental rights.

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with a serious constitutional question.

"In a long line of cases dating back more than 50 years, the Supreme Court has endowed the family with an aura of constitutional protection. In Meyer v. Nebraska, 262 US 390 (1923), the court invalidated a state law which prohibited the teaching of German. It held that the State's 'concern' for children and their best interest - in this case, the protection of children from foreign influences - was insufficient to overcome parents' rights to control their children's upbringing. In the more recent past in Stanley v. Illinois, 405 U.S. 645 (1972), the court invalidated an Illinois statute which automatically deprived non-marital fathers of their children's custody upon the death of their mother. In describing the rights of parents as compared to non-related third parties, the court stated:

> "(We have) frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential', 'basic civil rights of man' and 'rights far more precious than property rights'. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

The integrity of the family has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.

"And most recently, in Smith v. Organization of Foster Families, 53 L. Ed. 2d 14 (1977), a case involving the three sided dispute between the state, natural parents and foster parents (see Children's Rights Report, Vol. 1, Nos. 4 & 6), a unanimous Supreme Court held that the right of natural parents to the custody of their children is a 'constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right.'

"Relying on these and other cases, the Supreme Court has underscored a right which is nowhere clearly mentioned in the constitution but has recently come to be known as the 'right of family integrity'." (Quoted from Children's Rights Report, Vol. III, No. 2, October 2, 1978, p. 2).

In Smith v. Organization of Foster Parents, 431 U.S. 816, 53 L. Ed. 2d 14; 97 S. Ct. 2097 Justice POTTER STEWART in his separate opinion emphasized that the constitution forbids the state from depriving fit parents of their children because it

believes it to be in the child's "best interests", or because the child will be happier with someone else. In his opinion in which the Chief Justice and Mr. Justice REHNQUIST concurred he wrote: "One of the liberties protected by the Due Process Clause, the court has held, is the freedom to 'establish a home and bring up children' Meyer v. Nebraska, supra, at 399, 67 L. Ed. 1042, 43 S. Ct. 625, 29 ALR 1146. If a State were to attempt to force the breakup of a natural family over the objections of the parents and their children, without some showing of unfitness and for the sole reason that dodo so was thought to be in the child's best interest, I should have little doubt that the State would have intruded impermissibly on the 'private realm of family life which the state cannot enter' Prince vs. Massachusetts, 321 US 158, 166, 88 L. Ed. 645, 64 S. Ct. 438" (Smith v. Organization of Foster Parents, supra, 53 L. Ed. 14, 46-7).

More recently, the United States Supreme Court clearly raised the warning flag when in Quilloin v. Walcott, U.S. 54 L. Ed. 2d 511-519-520, 98 S. Ct. 549, 554-555 it said: "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. (citations.) 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and

freedom include preparation for obligations the state can neither supply nor hinder'. (citation.) And it is now firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment'. (citation.)

"We have little doubt that the Due Process Clause would be offended '(i)f a State were to attempt to force the breakup of a natural family over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest'." (citing Smith v. Organization of Foster Families for Equality and Reform, 431 US 816, , 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977) (Stewart J., concurring).

Likewise, the court of appeals in Bennett v. Jeffreys, 40 N.Y. 543, 548, which is the fountain-head for the development of the no-fault basis for the termination of parental rights and again in Matter of Goldman, 41 N.Y. 2d 894 recognized that in the exercise of the state's power there are constitutional limits to be observed. (See also, Janet G. v. N.Y. Foundling Hosp. 94 Misc. 2d 133, 141-142). More recently, in Matter of Corey L. v. Martin L., 45 N.Y. 2d 383 the Court of Appeals speaking with respect to

the termination of parental rights through adoption said (p. 386): "Despite recent changes in statutory law, there remains a heavy burden of constitutional magnitude on one who would terminate the rights of a natural parent through adoption". The constitutional barrier to the termination of a parent's rights is again emphasized by the court when at p. 389 it says: "Nevertheless,' while accepting the change wrought by statutory law, this court has and must continue to respect constitutional limitations on the procedures for termination or deprivation of parental rights (see Matter of Goldman, 41 N.Y. 2d 894, 895, supra; Matter of Bennett v. Jeffreys, 40 N.Y. 2d 543, 548)". And again at p. 392 the court says: " * * *, the statute should not be so broadly applied that it establishes a preference. A termination of parental rights is a drastic event indeed so much so that it raises questions of constitutional dimension" (citing Matter of Goldman and Bennett v. Jeffreys, supra).

Although Matter of Corey L. v. Martin L., supra dealt with the termination of a parent's right by reason of abandonment in the context of an adoption proceeding there is language in the court's opinion which can fairly be said to create some doubt as to whether or not the Appellate Divisions and the Family Courts have not gone too far in finding in Bennett a non-statutory, no fault ground for termination of parental rights all in obeisance to the rubric of

the "best interests" of the child. For instance, at p. 389 the court says: " . . . the ultimate question is whether the submitted proof establishes abandonment as a matter of law", citing Matter of Bistany, 239 N.Y. 19, 24 and Matter of Maxwell, 4 N.Y. 2d 429, 433. Cannot one with equal logic substitute "permanent neglect" for "abandonment"? And again at p. 391 the court says: "Absent consent, the first focus there was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion. * * * * The best interests of the child, as such, is not an ingredient of that conduct (the parents) and is not involved in the threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment". Again the question arises, cannot the words "permanent neglect" be substituted for "abandonment"? And finally, the court says (pp. 391-392): "If, for purposes of determining mere custody, the best interests of the child would not permit a parent to be displaced in the absence of extraordinary circumstances, surely a complete termination of obligations and rights is not to be

allowed in a situation where, as here, abandonment has not been established, even if an ensuing adoption might be viewed by some to be in the best interests of the child."

The Court of Appeals decision in Corey L. v. Martin L., supra has caused some Family Court Judges to have some second thoughts as to whether the implications thought to have flowed from Bennett have not been too broadly applied (See decision of Judge GARTENSTEIN who "crystalized" the no-fault concept in Matter of Suzanne Y., 92 Misc. 2d 652 in the Second Matter of Suzanne Y., 95 Misc. 2d 733; Matter of Elizabeth Green, Family Ct., Bronx Co., N.Y.L.J. Dec. 12, 1978, p. 12, c. 6; and In re Jonathan D., Family Ct. New York County, N.Y.L.J. Feb. 9, 1979, p. 6, col. 3). Obviously, the last word on the concept of a non-statutory, no fault ground for the permanent termination of parental rights has not yet been written and won't be until the Court of Appeals has occasion to clarify and resolve the issue.[7]

It is not necessary for this court to attempt to resolve the constitutional issue posed by the concept of no-fault termination of parental rights based upon a comparative best interest standard, for the case can be decided on statutory grounds (Social Services

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7. The Court of Appeals may soon have the opportunity to do so, since the decision of the Appellate Division (2nd Dept) in Matter of Sanjivini K., 63 AD2d 1021 is now on appeal to the Court of Appeals.

Reversed 47N.Y. 2d 394.

Law § 384-b and Family Court Act, Art. 6). "Constitutional questions should not be reached unless their disposition is necessary" (Comiskey v. Arlen, 55 A D 2d 304, 306, affd. 43 N.Y. 2d 696). It is enough to point out the constitutional infirmity in such a concept, leaving its final resolution to an appellate court.

Constitutionality of Quantum of Proof.

The respondent has raised a question as to the constitutionality of section 622 of the Family Court Act which permits the court to determine whether the allegations of permanent neglect (paragraphs (a), (b), (c) and (d) of subdivision one of section 614) are supported by a fair preponderance of the evidence. It is contended that to be constitutional the standard of proof must be "beyond a reasonable doubt" or at least "clear and convincing". The Attorney General has been notified that the constitutionality of the statute will be brought into question (Executive Law § 71, CPLR § 1012 (b), in this court, but he has chosen not to appear.

In response to the constitutional issue the court notes that sections 611 and 614 have been found to prescribe a constitutional standard of proof by the Appellate Division (3rd Dept.) In re Anthony L. "CC", 48 AD2d 415 and by a Family Court in Matter of Orzo, 84 Misc. 2d 482, 490-493.

Moreover, a finding of unconstitutionality should not be lightly undertaken by courts of first instance. "A statute should not ordinarily be set aside as unconstitutional by a court of original jurisdiction unless such decision is inescapable. Courts of first instance should not exercise transcendent power of declaring an act of the Legislature unconstitutional except in rare cases involving life and liberty, and where the invalidity of the Act is apparent on its face". (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 150, and authorities there cited. See, e.g. Comiskey v. Arlen, 55 A D 2d 304, affd. 43 N.Y. 2d 696; Bolling v. Corsi, 204 Misc. 778, 783, affd. 306 N.Y. 315). The tendency is to leave such questions to appellate tribunals (City of New Rochelle v. Echo Bay WaterFront Corp., 182 Misc. 176, 177, affd. 268 A D 2d 182, affd. 294 N.Y. 678). Even intermediate Appellate Courts sometimes defer to higher appellate courts (Matter of Excelsior Pictures Corp. v. Regents, 2 A D 2d 941). "There is a strong presumption that a statute duly enacted by the Legislature is constitutional" (People v. Pagnotta, 25 N.Y. 2d 333, 337).

Consequently, the issue of the constitutionality of the statute (F.C.A. § 622) will not be passed upon and the decision

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here made is predicated upon the standard of proof prescribed by the statute - "a fair preponderance of the evidence".

The Agency's Diligent Efforts.

The only real plan for the future of the Santosky children that has ever been formulated by anyone is the plan evolved by the Commissioner of Social Services pursuant to this Court's order of December 31, 1975 (See Matter of Santosky, supra 732).

To implement this plan through "diligent efforts" [8] to encourage and strengthen the parental relationship, the Agency in accordance with court's directive, redoubled its efforts to raise these parents to an acceptable minimal level of competency as parents (See Matter of Santosky, supra 741).

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8. Section 384-b, subd 7 (f) defines this phase as follows:

"(f) As used in this subdivision, 'diligent efforts' shall mean reasonable attempts by an authorized agency to encourage a meaningful relationship between the parent and the child, including but not limited to:

(1) Consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family.

(2) Making suitable arrangements for the parents to visit the child.

(3) Provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated.

(4) Informing the parents at appropriate intervals of the child's progress, development and health."

For an elaboration of the need for the Agency to make "diligent efforts" and the consequences of its failure to do so, see Matter of Anita FF, [illegible] 18.

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The Commissioner in his petition alleges and the proof supplied through the testimony of the two case workers in charge of the Santosky case supports a finding that following this court's decision in January 1977 and for the past two years at varying times the Agency has offered and arranged for and encouraged the respondents to accept:

(a) Visits with the children on an average of twice a month, the children being brought to their home.

(b) Attendance by Respondent, Annie Santosky at the Child Enrichment Program offered by the Family Service Center to mothers with pre-school children, which program included the use of a parent aid. Transportation was provided.

(c) Psychological evaluations of both respondents, and a complete neurological evaluation of the Respondent, John Santosky, at St. Francis Clinic, Poughkeepsie. Transportation was also provided.

(d) Follow-up psychiatric and psychological services to both respondents at Southern Ulster Mental Health Center.

(e) Counseling sessions for Respondents with certified social worker, Elizabeth Smith of Family Service Center.

(f) Birth control counseling at Planned Parenthood.

(g) Vocational training to the Respondent, John Santosky through the Office of Vocational Rehabilitation and Gateway Industries.

(h) Education assistance to the Respondent, John Santosky at the Adult Learning Center.

(i) Nutrition Aid Services to Respondent, Annie Santosky since November 1977.

(j) Homemaker Service to help the Respondents immediately prior to and after the birth of their fourth child in June 1978.

(k) Public Assistance, Food Stamps and Medicaid to the Respondent. The total value of all Social Services offered to the Respondents since November 1976 exceeds $16,000.

"In short," as the court stated in its opinion in Matter of Santosky, supra, 733; "ever since the Santosky children have been in foster home placement, the parents have not only had offered, but diligently urged upon them every social service available in Ulster County which could conceivably have helped the Santoskys in achieving a goal of the eventual reunion of the family".

I am satisfied, therefore, as I was in the earlier case, that the preponderance of the evidence supports a finding that the Ulster County Department of Social Services has indeed made diligent efforts to encourage and strengthen the parental relationship. The observation that it has done so, "albeit with minimal success" cannot, however, be truly said of the Agency's renewed

and redoubled efforts. To credit the Agency's efforts with any success this time around is to take a more charitable view of the matter than the evidence warrants, for both case workers who have been so long intimately involved with providing social services to this family testified that in spite of all their efforts they could discern no forward progress whatever; that their progress in parenting ability and skills was non-existent. At the end, the Santoskys' capacity to function as parents for their children remained as minimal as at the start. Regretfully, the Agency acknowledges that its diligent efforts through the offering of a variety of social services, which met with a response ranging from grudging acceptance to outright hostility has been a failure. Nevertheless, in spite of ample cause for discouragement and ultimate failure the court is satisfied that the requirement of paragraph (c) of subdivision one of Section 614 of the Family Court Act has been amply met by a preponderance of the evidence.

Since the children who are but 7, 5 and 4 years of age are all obviously under 18 years of age and are presently by virtue of orders of this court in the care of the Ulster County Department of Social Services, an authorized Agency, the court finds that the requirements of paragraphs (a) and (b) of subdivision one of Sec-

tion 614 of the Family Court Act are supported by a preponderance of the evidence. As in the first trial of this case the critical issue and the one on which the parents right to the continued possession of their children stands or falls, is their alleged failure to plan for the future.

The Parents' Financial Ability to Plan.

To sustain an adjudication of permanent termination of parental rights there must be a finding that the parents "failed for a period of more than one year * * * substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so", (F.C.A. §§ 611, 614, subd. 1 (d)).

Because the phrase, although . . . "financially able to do so" could not under well recognized rules for the construction of statutes be rejected as superfluous but had to be given meaning and effect (McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 231), the court in its earlier decision in this case found that because they were the recipients of full public assistance, including food stamps and medicare, that the Santoskys' financial ability was non-existent. In short, the court found that by reason of their poverty, their failure to plan for the future had to be excused (See Matter of Santosky, 89 Misc. 2d 730). Although the dismissal of the proceeding was affirmed on appeal, this conclusion

of the trial court was rejected by the Appellate Division (3rd Dept) which in its decision of affirmance under the name of Matter of John W. and others, 63 AD2d 750 said: "The Court determined, however, that respondents' failure to plan for the future of the children had to be excused by their poverty. It is the opinion of this court that, absent evidence that a parent is receiving an inadequate amount of public assistance, the fact that the parent is receiving public assistance does not automatically excuse that parent from substantially planning for the future of a child. There was no proof in the present case that respondents were receiving inadequate public assistance."

This view of the adequacy of public assistance to provide sufficient financial ability to plan for the future seems to be shared by the Appellate Divisions of both the 1st and 4th Departments. In Matter of Klug, 32 AD2d 915 the 1st Dept. observed: "So far as financial ability to care for a child is concerned, the court is well aware of the fact that in this city a mother may obtain support to maintain herself and her child." And in Matter of Karas v. Karas, 59 AD2d 1022 the 4th Dept. said: "Respondent contends on appeal that the proof fails to establish by a preponderance of the evidence that she was financially and physically able either to maintain contact with or plan for the

future of her children. The assertion of financial ability clearly lacks merit. Although respondent was a recipient of public assistance, she could have made arrangements to visit and communicate with her children."

To rebut any contention that the public assistance furnished to the Santoskys might be inadequate, although no such contention was in fact made, the Commissioner offered proof that from December 1, 1976 to September 30, 1978 the County of Ulster furnished to the Santoskys financial assistance totaling $15,338.72 in the following categories and amounts:

Public Assistance	$ 9,120.00
Medicaid	2,633.72
Nutrition Aide	150.00
Counseling Service	300.00
Child Welfare Caseworker Counseling	3,155.00
TOTAL	$ 15,338.72

In light of the Appellate Division's decision in this case, Matter of John W. and others, 63 AD2d 750, and the Appellate decisions to which reference has been made the court is constrained to hold that the Santoskys' total dependence on public assistance throughout the history of this litigation furnishes no excuse for their failure to plan for the future of their children so long in foster care.

Failure to Plan.

This court in its earlier decision in this case (Matter of Santosky, 89 Misc. 2d 730, affd. 63 AD2d 750) reviewed at some length (pp 734-5) the decisional definitions of the phrase "substantially to plan for the future of the child." Much of what was there said has now been codified by the enactment of Section 384-b of the Social Services Law (L. 1976, c. 666, effective January 1, 1977) where in subd. 7 (c) "to plan for the future of the child" is defined.

Social Services Law § 384-b, subd. 7 (c) now provides:

"(c) As used in paragraph (2) of this subdivision, 'to plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent".

In contrast to the situation prevailing at the time of the first trial (November 1976) when this court was able to find that "while the Santoskys' plans for the future of their children (were) indeed nebulous and (had) never been articulated, they (had nevertheless) 'acted to accomplish' the agency's plans" [9] these parents' failure since 1976 to "utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources" has been almost total and complete. Except for superficial cooperation with a nutritional aide and a public health nurse, the Santoskys have failed in any meaningful way to take advantage of the many social and rehabilitative services that have not only been made available to them but have been diligently urged upon them. Even Elizabeth Smith, Director of the Family Service Center of the Children's Home of Kingston, the witness who was previously most favorable to their cause, has been reluctantly forced to conclude because of their passivity and reluctance to participate in activities designed to

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9. This finding was found by the Appellate Division to be sufficiently supported by the record. "Considering the record as a whole, we are of the opinion that the respondents have substantially planned for the future of their children" (Matter of John W. and others, 63 AD2d 750).

help them, [10] particularly the Children's Enrichment Program, a program specifically designed to deal with the problems of parent-child relationships, that the return of any of the children to the Santoskys' in any foreseeable future should not be considered.

At no time can it be fairly said that these parents have ever "tak(en) such steps as may be necessary to provide an adequate, stable home and parental care for the child(ren) within a period of time which is reasonable under the financial circumstances available to (them)," (Social Services Law § 384-b subd. 7 (c)). Two of these children have been in foster care for more than four years and the third more than five. For all of this time the Santoskys have been the recipients of Social Ser-

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10. The four factors which to the witness provided contradiction to the return of the children to the Santosky home within the foreseeable future were:

> "1. The Santoskys' passivity in seeking and participating in activities intended to be helpful to them (In the main, I see them only if I am able to go to their home as they have made numerous excuses as to why they could not keep appointments at my office);
>
> 2. The Santoskys' restrictive parenting practices which inhibit normal development in their child;
>
> 3. The Santoskys' fears which preclude participation in activities outside their own family group.
>
> 4. The recent birth of a fifth child which adds to the demands made upon both Mr. and Mrs. Santosky."

vices [11] and there is nothing in their situation which holds out any hope that they may ever become financially self sufficient or emotionally mature enough to be independent of the services of social agencies. More than a reasonable amount of time has passed and still, in the words of the case workers, there has been no discernible forward movement. At some point in time it must be said, "enough is enough".

Except for the plan [12] formulated by the Agency, and the Santoskys' superficial efforts to comply therewith, which have tapered off to the point where they are no longer measureable, there has never been any "plan" formulated by the parents, probably because they are simply incapable of doing so. However, even giving them credit for their miniscule efforts to comply with the Agency's plan through taking advantage of the social services offered to them is no longer enough to save them from the loss of their children, for the statute states that, "good faith effort shall not of itself, be determinative". (Social Services Law § 384-b, subd. 7 (c)).

In short, the time has arrived when the court must acknowledge,

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11. Since 1976 a total of $9,120 has been provided in public assistance and a total of $6,118.72 in other social and rehabilitative services.

12. See Matter of Santosky, 89 Misc. 2d 730.

no matter how tragic the result may be for these parents, that the Santoskys are not now capable, and at any time in the foreseeable future, are probably incapable, despite all efforts to assist them, of planning for the future of their children as that term is defined by law (Social Services Law, §384-b, subd. 7 (c)), in any meaningful way. I therefore conclude that the record in this case supports by a preponderance of the evidence a finding that there has indeed been a failure on the part of these parents to "plan for the future of (their children) although physically and financially able to do so" (F.C.A. § 614, subd. 1 (d); Matter of Orlando F., 40 N.Y. 2d 103).

The testimony of the petitioner's witness, Dr. Lenore M. Sportsman, Director of the Albany Child Guidance Center, and Exhibits No. 2-4 in evidence have not been considered in the determination of the Fact Finding phase of this proceeding (F.C.A. § 622, but will be considered in the Dispositional Hearing (F.C.A. § 623).

This matter will, therefore, be scheduled for a dispositional hearing "to determine what order of disposition shall be made in accordance with the best interests of these children" (F.C.A. § 623). The Clerk of the Court is directed to schedule such a dispositional hearing on notice to all interested parties.

In the meantime, and until such a hearing can be held, the

Commissioner's application for an extension of placement is granted and the children are continued in the care of the Commissioner of Social Services (F.C.A. § 1055).

Dated: March 12, 1979.

STATE OF NEW YORK

FAMILY COURT : COUNTY OF ULSTER

In the Matter of

TINA FRANCES APEL	Docket Nos.
JOHN SANTOSKY III	N-34-73
JED CONRAD SANTOSKY	N-35-74
	N-36-74

Persons Alleged to be Neglected Children.

June 14, 1977

RICHARD GRIGGS, Attorney for Department of Social Services.

ALAN SUSSMAN, Attorney for Respondents.

JAY SAMOFF, Law Guardian for Children.

HUGH R. ELWYN, J.: Tina Frances Apel, now nearly 6 years of age, the daughter of Annie Santosky, one of the respondents herein, was adjudicated to be a neglected child within the meaning of Article 10 of the Family Court Act on November 26, 1973 and placed with the Ulster County Commissioner of Social Services for an initial period of 18 months, subject to the further order of this court.

The order of placement was, by consent, temporarily extended on May 10, 1975 and again on August 19 and December 5, 1975. On December 31, 1975, in accordance with this court's written decision of the same date order of placement was extended for a period of one year from the date of the expiration of the initial 18 months of placement until May 26, 1976.

John Santosky III and Jed Conrad Santosky who are now nearly 4 and 3 years of age respectively, the children of John and Annie Santosky were each adjudicated to be neglected children within the meaning of Article 10 of the Family Court Act on September 30, 1974 and placed with the Ulster County Commissioner of Social Services for an initial period of 18 months, subject to the further order of this court. On March 9, 1976 the order of placement for John Santosky III and Jed Conrad Santosky was extended, upon consent, to April 13, 1976. On April 13, 1976 the orders of placement for John Santosky III, Jed Conrad Santosky and Tina Frances Apel were, on consent, extended to July 15, 1976. Without objection all three children continued to remain in foster care after July 15, 1976, although the order for extended placement had expired.

On September 9, 1976 the Commissioner of Social Services filed petitions involving all three children (Docket Nos. B-4-76,

B-5-76 and B-6-76) charging the parents with permanent neglect (F.C.A. Article 6). On September 24, 1976 in proceedings had in the permanent neglect proceedings, at which the Commissioner and the respondents were represented by counsel and the children by their Law Guardian, the orders of placement affecting the three children in Docket Nos. N-34-73, N-35-74 and N-36-74 were, on consent, "extended until such time as the court makes a determination in the permanent neglect proceedings now before it", without prejudice to the rights of the petitioner and the law guardian to make an application for an extension of the order of placement.[1] Accordingly, on September 24, 1976 orders extending the placement with the Commissioner of Social Services were made continuing the status quo as to all three children without prejudice to the rights of the petitioner or the respondents.

The proceedings in which all three children were alleged to be permanently neglected was tried in this court on November 16, 17, and 18, 1976; a decision was rendered dismissing the petitions on January 28, 1977 and an order entered accordingly. This decision is now on appeal to the Appellate Division, 3rd Department. Although this court's decision and order dismissing the permanant

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1. As an appendix a transcript of that portion of the proceedings of September 27, 1976 containing the aforesaid stipulation of counsel is annexed hereto.

neglect proceedings was made on January 28, 1977, the children have continued to remain in the Commissioner's care in foster homes.

On March 31st, 1977 the Commissioner filed separate petitions in each neglect case seeking an extension of placement for each of the Santosky children for the reason that "to return child would be contrary to best interest of this child. The parents are not cooperating fully with the services being recommended to strengthen the parental relationship". Attached to each petition is a copy of a report from Lenore M. Sportsman, M.D., Director of the Albany Child Guidance Center for Psychiatric Service affiliated with Albany Medical College Union University, warning of the adverse impact upon the children of continued exposure to their parents. Since "no placement shall be extended or continued * * * * except upon a hearing held concerning the need for extending or continuing the placement" (F.C.A. § 1055 (ii)), a hearing on the petitioner's request for an extension of the placement was held on June 14, 1977.

Unlike an application for the extension of placement of a juvenile delinquent or a PINS which when it has expired may not be extended nunc pro tunc (People ex rel. Schinitsky v. Cohen, 34 A D 2d 1020), an application for extension of an expired order of placement may be granted where the original order of placement was made in a neglect proceeding pursuant to Article 10 (Matter of

Morris W., 79 Misc. 2d 567). Accordingly, even though the application for the extension of placement was not made until two months after the court had rendered its decision in the permanent neglect matter and the order of placement pursuant to the stipulation of September 27, 1976 had expired, the court will, nevertheless, entertain the Commissioner's application for an extension of the orders of placement for these children. The imperative of this court's responsibility to act in the best interests of these children who, as a de facto matter are still in foster care, demands that the court assume jurisdiction in spite of any possibility of loss of jurisdiction through a lapsed order.

Although still maintaining, as he did on previous applications for the extension of placement and in the permanent neglect proceeding, that the Santoskys have yet to demonstrate their capacity to function as responsible parents capable of providing for their children, the emphasis in the Commissioner's case has now shifted from the shortcomings of the parents to the potential psychological damage to the children were they to be returned to their parents to justify the need for continued placement. For essentially the same reason, i.e. the psychological trauma to the children through exposure to the parents, the Commissioner has cut off the parents visitations with their children and has permitted no visits by

the parents with their children since this court's decision in the permanent neglect case in January 1977.

In fairness, it must be said that the Commissioner's position is not wholly arbitrary but is supported by and based almost entirely upon the very respectable professional opinion of Dr. Lenore Sportsman, the Director of the Albany Child Guidance Center in a series of reports to the Commissioner which reports are in evidence[2] and which were corroborated and elaborated upon by the doctor's sworn testimony.

In summary the Dr. found in each child evidence of emotional "hang-ups" (depression, anxiety) related to a fear of having to be repossessed by their parents; that the natural parents no longer represented the "psychological parents"; that for the children to be compelled to maintain contact with their natural parents would only exacerbate their fears and anxieties; that there was nothing positive for the children in allowing continued contact between the children and their parents, but rather that it would hinder their progress.

In contrast to Dr. Sportsman's opinions stands the testimony of Elizabeth Smith, the Director of the Family Planning Center, a witness for the Santoskys, who over a period of many months has worked closely with both Mr. and Mrs. Santosky counselling them

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2. See Appendix 11.

in many areas, but essentially, as she put it, to become individuals capable of standing on their own feet and to be emotionally independent of the other. Although she felt it important that the parents be permitted to maintain contact with their children for their emotional health, she also conceded under questioning by the court that the time was not yet ripe for the immediate return of all three children to the parents. Instead, she recommended a phased reintroduction of the children into the home and when asked by the court for her professional advise in the matter, counseled against the immediate return of the children.

It is interesting to note that both of the professional witnesses who testified conceded that neither had talked to the other side or considered their point of view. That is, Dr. Sportsman's opinion concerning the psychological impact upon the children from further exposure to the parents was based solely upon her examination of the children without talking to the parents or taking into account their point of view and Mrs. Smith's opinions were based solely upon her contacts with the Santoskys and an espousal of their cause without ever having seen or made any attempt to evaluate the children. Thus, both professional witnesses were really advocates with a bias - Dr. Sportsman for the children and Mrs. Smith for the parents.

The court is well aware of its responsibilities to act in these matters in the best interests of the children, but the court also believes that it has a responsibility to the parents as well and that in evaluating the need for an extension of placement the court must weigh and, if possible, try to accommodate what seems to be competing interests. In discharging that responsibility the court has conscientiously weighed these competing interests and for the reasons hereinafter expressed is of the opinion that the time is not yet ripe for the immediate return of all three children to the Santosky household.

First, because in spite of the long time that has elapsed since these children were first placed in foster care and the conceded substantial progress the Santoskys have made toward becoming more emotionally stable, mature persons and Mr. Santosky's commendable academic progress toward securing a high school equivalency diploma, I am not yet convinced that I can with a clear conscience safely entrust the care and upbringing of these children to these parents, especially when I recall the circumstances which led to the original adjudication of neglect.

Secondly: Mrs. Elizabeth Smith, the Santoskys' own professional witness and the person most sympathetic to their plight and their cause has counseled against it.

Thirdly: An appeal from the court's decision dismissing the Commissioner's case of Permanent Neglect is pending in the Appellate Division, Third Dept. If the Appellate Court were to reverse the court's decision and find that these children were indeed permanently neglected children within the meaning of Article 6 of the Family Court Act and Section 384-b of the Social Services Law, and direct their commitment to the Commissioner for adoptive placement, the Santoskys' joy upon their reunion with the children would have been illusory and short lived at best; at worst, it would wreak untold emotional havoc upon the children to have been taken from their foster parents to be delivered to their natural parents who, according to Dr. Sportsman, no longer are the psychological parents only to have them uprooted once more for re-delivery to the foster parents for adoption. Prudence would seem to dictate that this eventuality, which can only be described as a nightmare for the children, should be avoided at all costs. On the other hand, if the children are continued in foster care and the Appellate Court should affirm this court's decision finding these children not to be permanently neglected children as that term is used in the law, no movement of the children would have taken place in the interim and the parents would still be free to seek an early termination of the court's order extending their placement if the then existing cir-

cumstances warranted it (F.C.A. § 1062). Of course, the parents would have been denied the custody of their children in the interim but in balancing their interests against the best interests of the children, it is, I am afraid, a price they will have to pay. Prudence and caution counsel that the status quo remain undisturbed until the uncertainties concerning these children's future generated by the permanent neglect proceedings and the pending appeal be resolved.

Consequently, the Commissioner's application for an extension of the placement of all three children is granted and the placements will be extended for an additional period of one year, subject to whatever rights the respondents may have pursuant to section 1062 of the Family Court Act to petition for an earlier termination.

With respect to the respondents' order for the Commissioner to show cause why the parents should not be permitted to resume periodic visitation with their children while in foster care, I do not believe in spite of Dr. Lenore Sportsman's warnings concerning the effect these visits have upon the children's emotional health, that the Commissioner has shown sufficient cause for withholding them. The agency is under a statutory duty to make diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests[3] of the

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3. Formerly the criterion was that the efforts "not be detrimental to the moral and temporal interest of the child" (Family Court Act § 611, amended L. 1976, C. 666 § 14).

child" (Social Services Law § 384-b (7) (a); See also Volume 18 of the Codes, Rules and Regulations of the State of New York applicable to the Department of Social Services, particularly section 450.8 (6)).

"The best interests of the child" which is, of course, no where specifically defined, is perhaps an even broader concept than the phrase it replaced - "the moral and temporal welfare of the child." It is certainly broad enough to embrace considerations other than the child's emotional "hang-ups", i.e. depression, anxiety, fear of monsters and the like. In short, the court cannot, as the psychiatrist does, focus upon the child's emotional "hang-ups" to the exclusion of other valid considerations in deciding what is in "the child's best interests".

It is not contended that the parents' visits with their children have a deleterious effect upon them by reason of the parents' alcoholism, drug abuse, abusive or threatening behavior or by virtue of any moral defect of character. Rather the sole reason for denying visitation is that through the passage of time and lack of frequent contact the parents have become virtual strangers to their children, or in the language of the psychiatrist they have ceased to be the "psychological parents". Thus the very condition which the court created to save these children from their neglectful

parents - all of course presumably in their best interests - has bred and fostered the condition now complained of - an attenuated, almost non-existent parent-child relationship. The obvious defect in the whole foster care system - the separation and consequent alienation of children from their parents has fed upon itself and spawned a genie that no one knows quite how to put back into the bottle. Once again the Santoskys find themselves caught up in the "Catch 22" situation of being threatened with the loss of their children through failure to maintain contact and to plan for their children's future, while being denied access to their children because a psychiatrist has found parental visits to be an anxiety creating, emotionally disturbing experience for the children.

If these parents are to retain any hope whatever of ever regaining the custody of their own children and assuming once again their rightful responsibility for their upbringing, it is absolutely essential, in my judgment, that some contact, however tenuous, be maintained between parent and child, even if it is not an altogether happy experience for the child. Otherwise, the Department of Social Services has accomplished by indirection - all cloaked in the rubric of "the best interests of the child" what they have so far failed to accomplish by direction - for all practical purposes the termination of all parental rights through denial of access to

their own children. This should not be permitted to happen merely because in the opinion of a psychiatrist of some professional eminance the visits are confusing and emotionally upsetting to the children.

Unless and until these parents' rights to the custody and control of their own children are terminated permanently by an Appellate Court's reversal of this court's judgment or their rights are somehow terminated by a court of competent jurisdiction, these parents' right to maintain some kind of a meaningful contact with their own children should not be wholly cut off, even if these children do suffer some confusion and emotional "hang-ups" in the process.

Again, it is a matter of weighing competing interests and in my judgment the need for keeping the door ajar to the possibility of a full resumption of the parents' rights and responsibilities, at least until the appeal now pending involving these children is determined, outweighs any temporary emotional upset the children may suffer as a consequence.

It is simply beyond the ability of the law to provide every child with a perfect, or even near perfect, set of parents. The luck of the draw in the selection of one's parents is determined by a higher authority of whose wisdom and knowledge it is ex-

claimed: "how unsearchable are his judgments and his ways past finding out".[5] It is indeed deplorable that the Santosky children have had the misfortune to be born to parents who have so far proven themselves wholly inadequate to the task, but until these parents' rights to their own children are legally terminated it is a misfortune they will simply have to bear.

Consequently, since I find that it will not be detrimental to the child's best interests for the agency to continue diligent efforts to encourage and strengthen the parental relationship, the Commissioner of Social Services and his authorized deputies are hereby ordered, until the determination of the appeal in the permanent neglect proceedings now pending, to permit the respondents to visit with each of their children now in foster care at least twice a month, for a minimum of two hours per visit, subject to the further order of the court upon the determination of the appeal. (F.C.A. § 255; In re Edward M., 76 Misc. 2d 781, affd. sub. nom. in re Murray, 45 A D 2d 906; Usen v. Sipprell, 41 A D 2d 251).

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5. Romans. 11:33.

Dated: June 27, 1977.

Sec. 631 F.C.A.

At a Term of the Family Court of the State of New York, held in and for the County of ULSTER at KINGSTON, New York on April 5, 1979

PRESENT: HON. HUGH R. FLAVIN
Judge

In the Matter of

TINA FRANCES APEL

A Child under the Age of Eighteen Years, Alleged to be a Permanently Neglected Child.

Docket No. B-3-79

ORDER OF DISPOSITION

A Petition under Article 6, Part 1 of the Family Court Act having been filed in this Court alleging that Tina Frances Apel is a permanently neglected child; and summons having been issued and duly served upon Johnnie and Annie Santocky, the parent(s) (~~custodian(s)~~) of said child; and

The matter having duly come on for an adjudicatory hearing; and the said parent(s) (~~custodian(s)~~) having appeared (~~having failed to appear~~) thereon; and this Court, after hearing the proofs and the testimony offered in relation to the case, having found that the allegations of the petition herein required by paragraphs (a), (b), (c) and (d) of Section 614 of the Family Court Act are supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing; and the said parent(s) ~~Custodian(s)~~ having appeared (~~having failed to appear~~) thereon; and this Court having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved in this proceeding; now, therefore, it is

ADJUDGED that Tina Frances Apel is a permanently neglected child as defined by Article 6, Part 1 of the Family Court Act; and

*IT APPEARING that the moral and temporal interests of the child require that the parent'(s') ~~custodian(s)~~ custody of the child be terminated permanently, it is

*ORDERED that the custody of Tina Frances Apel the parent(s) (~~custodian(s)~~) of said child, over said child be and the same hereby is terminated permanently; and it is further ~~ORDERED~~

*ORDERED that the custody of said child be and the same hereby is awarded to Ulster County Commissioner of Social Services the Petitioner herein (upon the following terms and conditions: that the Commissioner provide supportive help to the child and foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisors may be required to best promote the adjustment of child and foster parents or adoptive parents to a healthy and permanent relationship.

**IT IS ORDERED that judgment be and the same hereby is suspended upon the terms and conditions specified in the appendix annexed to this order and made part hereof.

ENTER,

J.F.C.

*These provisions are eliminated if judgment is suspended.
**This provision is eliminated if judgment is not suspended.

Best Copy Available

§ [illegible], 631 F.C.A. Form 6-1-5 (Permanent Neglect)

At a Term of the Family Court of the State of New York, held in and for the County of ULSTER at KINGSTON, New York on April 5, 1979

PRESENT: HON. HUGH R. [illegible]
Judge

In the Matter of

JOHN SANTOSKY III

A Child under the Age of Eighteen Years, Alleged to be a Permanently Neglected Child.

Docket No. B-4-78

ORDER OF DISPOSITION

A Petition under Article 6, Part 1 of the Family Court Act having been filed in this Court alleging that John Santosky III is a permanently neglected child; and summons having been issued and duly served upon Johnnie and Annie Santosky, the parent(s) (Custodian(s)) of said child; and

The matter having duly come on for an adjudicatory hearing; and the said parent(s) (Custodian(s)) having appeared (having failed to appear) thereon; and this Court, after hearing the proofs and the testimony offered in relation to the case, having found that the allegations of the petition herein required by paragraphs (a), (b), (c) and (d) of Section 614 of the Family Court Act are supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing; and the said parent(s) (Custodian(s)) having appeared (having failed to appear) thereon; and this Court having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved in this proceeding; now, therefore, it is

ADJUDGED that John Santosky III is a permanently neglected child as defined by Article 6, Part 1 of the Family Court Act; and

*IT APPEARING that the moral and temporal interests of the child require that the parent's) (Custodian's) custody of the child be terminated permanently, it is

*ORDERED that the custody of John Santosky III, the parent(s) (Custodian(s)) of said child, over said child be and the same hereby is terminated permanently; and it is further

*ORDERED that the custody of said child be and the same hereby is awarded to Ulster County Commisioner of Social Services the Petitioner herein (upon the following terms and conditions: that the Commisioner provide supportive help to the child and foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisors may be required to best promote the adjustment of child and foster parents or adoptive parents to a healthy and permanent relationship.

IT IS ORDERED that judgment be and the same hereby is suspended upon the terms and conditions specified in the appendix annexed to this order and made part hereof.

ENTER,

J.F.C.

*These provisions are eliminated if judgment is suspended.
**This provision is eliminated if judgment is not suspended.

Sec. 631 F.C.A.

Form 6-1-5 (Permanent Neglect)

At a Term of the Family Court of the State of New York, held in and for the County of ULSTER at KINGSTON, New York on April 5, 1979

PRESENT: HON. HUGH R. ELWIN
Judge

In the Matter of

JED CONRAD SANTOSKY

A Child under the Age of Eighteen Years, Alleged to be a Permanently Neglected Child.

Docket No. B-5-73

ORDER OF DISPOSITION

A Petition under Article 6, Part 1 of the Family Court Act having been filed in this Court alleging that Jed Conrad Santosky is a permanently neglected child; and summons having been issued and duly served upon Johnnie and Annie Santosky, the parent(s) (custodian(s)) of said child; and

The matter having duly come on for an adjudicatory hearing; and the said parent(s) (custodian(s)) having appeared (having failed to appear) thereon; and this Court, after hearing the proofs and the testimony offered in relation to the case, having found that the allegations of the petition herein required by paragraphs (a), (b), (c) and (d) of Section 614 of the Family Court Act are supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing; and the said parent(s) (custodian(s)) having appeared (having failed to appear) thereon; and this Court having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved in this proceeding; now, therefore, it is

ADJUDGED that Jed Conrad Santosky is a permanently neglected child as defined by Article 6, Part 1 of the Family Court Act; and

*IT APPEARING that the moral and temporal interests of the child require that the parent'(s') (custodian's(s')) custody of the child be terminated permanently, it is

*ORDERED that the custody of Jed Conrad Santosky the parent(s) (custodian(s)) of said child, over said child be and the same hereby is terminated permanently; and it is further

*ORDERED that the custody of said child be and the same hereby is awarded to Ulster County Commisioner of Social Services the Petitioner herein (upon the following terms and conditions: that the Commissioner provide supportive help to the child and Foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisors may be required to best promote the adjustment of child and foster parents or adoptive parents to a healthy and permanent relationship.

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~~*IT IS ORDERED that judgment be and the same hereby is suspended upon the terms and conditions specified in the appendix annexed to this order and made part hereof.~~

ENTER,

J.F.C.

*These provisions are eliminated if judgment is suspended.
**This provision is eliminated if judgment is not suspended.

FAMILY COURT
of the
STATE OF NEW YORK
COUNTY OF

IN THE MATTER OF

3 Mo. No. 797

In the Matter of
Tina Frances Apel, John Santosky III and Jed Conrad Santosky, children &c. Alleged to be Permanently Neglected Children.

Bernhardt S. Kramer, Commissioner Ulster County Department of Social Services,

—Respondent,

John Santosky II and Annie Santosky,

Appellants.

Motion to dismiss appeal granted and appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

DENISTON COURT OF APPEALS SEP 16 1980

SEP 18 1980

AT a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, commencing on the 17th day of March, 1980.

PRESENT:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
Associate Justices.

In the Matter of TINA FRANCES APEL, JOHN SANTOSKY III and JED CONRAD SANTOSKY, children under the age of eighteen years alleged to be Permanently Neglected Children.

ORDER

BERNHARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,

36228

Petitioner-Respondent,

JOHN SANTOSKY II and ANNIE SANTOSKY,

Respondents-Appellants.

The appellants having appealed from a judgment of the Family Court of Ulster County (ELWYN, J.), entered April 5, 1979, which adjudged appellants' three children to be permanently neglected pursuant to article 6 of the Family Court Act, and said matter having been presented during the above-stated Term of this Court, and after due deliberation the Court having rendered a decision on May 1, 1980, it is hereby

ORDERED that the judgment appealed from be affirmed, without costs.

ENTER:

/s/ John J. O'Brien
Clerk

DATED AND ENTERED: May 7, 1980

A TRUE COPY

/s/ John J. O'Brien
Clerk